

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 260 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI and

MR. JUSTICE R. BALIA.

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes.

2. To be referred to the Reporter or not? Yes. @

3. Whether Their Lordships wish to see the fair copy
of the judgement? No.

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No.

5. Whether it is to be circulated to the Civil Judge?
No.

SAYAJI IRON & ENGINEERING CO PVT LTD.

Versus

COMMISSIONER OF INCOME TAX

Appearance:

MR JP SHAH for Petitioner
MR BHARAT J SHELAT instructed by
MR MANISH R BHATT for Respondent.

CORAM : MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE R.BALIA.

Date of decision: 13/01/97

ORAL JUDGEMENT (Per R. Balia, J)

Assessee has received refund from the Department during the assessment year and it included the amount of interest on the refund to the tune of Rs.20,356/-. Though the same was taxable it was not shown in the Return as an income.

2. In its Return for Assessment Year 1970-71 u/s 139

(1) the assessee disclosed his income at Rs.2,69,001/which did not include the above interest income and the income was finally assessed at Rs.2,66,630/-. Later on the Income-tax Officer on noticing the facts about payment of interest on refund issued notice u/s 148. The assessee filing return in response to notice u/s 148 showed the said amount of interest as his income for the Assessment Year 1970-71. Assessment was accordingly completed. The Income-tax Officer after issuing notices u/s 271(1)(c) for levy of penalty for concealment of income regarding the said amount.

3. In the first instance, before the Income-tax Officer the assessee explained that because he was not furnished with the details of the amount which constituted the entire refund amount he could not furnish the particulars about the income from interest on refund. When it was pointed out to the assessee that refund notices were issued by the ITO and served on the assessee, plea was taken before the C.I.T. (A) that the said information was lost sight off by the assessee as the demand notices were attached with the appeal memos and were not returned after appellate orders were passed. It was also urged by the assessee that the entire amount of refund has been carried to the books of account and the amount has been paid by the Department itself there was no reason for the assessee for deliberately not to furnish particulars of interest embedded in the refund as the factum of earning that income was within the knowledge of the department even before he had filed the return. It was a case of contributory negligence as neither the assessee noticed the fact of inclusion of interest amount in the refund nor did the ITO who has had

knowledge about the interest having been paid on the refund amount paid to the assessee. However, C.I.T. (A) rejected the plea of the assessee and confirmed the order of penalty levied by the ITO u/s 271 (1) (c) of the Income-tax Act, 1961.

4. From the aforesaid, it is clear that the assessee's explanation about non-furnishing all the particulars of the income arising out of interest on refund was that due to oversight the same could not be furnished at the time of assessment. To say in other words the say of the assessee was that there was no intention on his part to conceal the income or to furnish inaccurate particulars by willful neglect. The Tribunal reached its conclusion as under :-

"We have carefully considered the submissions of both the parties. It is admitted position that the assessee was informed about the payment of interest u/s 214 by the Income Tax Department. Thus, the assessee did furnish inaccurate particulars of its income while filing the original return. Assessee's claim of oversight in not declaring the interest income while filing return of income cannot detract from the fact that the assessee did furnish inaccurate particulars. As the assessee did furnish inaccurate particulars of its income, penalty provisions u/s. 271 (1) (c) is clearly attracted. We would accordingly uphold the penalty and dismiss assessee's appeal."

5. Following two questions have been referred for opinion of this Court at the instance of the assessee.

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in upholding the penalty u/s 271 (1) (c) on the ground that inaccurate particulars of income were filed and oversight does not detract from that fact ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal's decision is contrary to ratio of the Supreme Court decision in CIT Vs. Anwar Ali (76-ITR-696 holding that without Revenue establishing the guilty mind on the part of the assessee, offence under Section 271 (1) (c) is not established and no penalty can be imposed under the said provision ?"

6. Heard learned Counsel for the parties and perused the order of the Tribunal and other annexures forming part of the statement of the case. A pointed reference has been made about applicability of the ratio laid down in the decision of the Supreme Court in the case of CIT Vs. Anwar Ali (76 ITR 696) which laid down that before the penalty can be imposed the entirety of circumstances must reasonably point to the conclusion that the disputed amount represented income and that the assessee had consciously concealed the particulars of his income or had deliberately furnished inaccurate particulars. It has been emphasised by the learned Counsel for the assessee that unless there is finding about conscious concealment of particulars of income or deliberately furnishing inaccurate particulars, there could be no penalty. It has been contended by the learned Counsel for the Revenue that ratio laid down in Anwar Ali's case cannot be applied to the assessment made after 1-4-1964 when by amending Section 271 (1) (c) the word "deliberately" has been omitted from the provision of the Statute and now establishing deliberate action on the part of the assess in furnishing inaccurate particulars cannot be pre condition before penalty can be levied.

7. The above controversy is before us in the form of two questions referred to above and the facts mentioned above.

8. In this connection it will be appropriate to notice the amendments which were brought to the statute which existed immediately before amendment brought in force by the Finance Act, 1964 and the provisions which existed during the relevant time governing the penalty provisions before considering the aforesaid contentions.

9. The following relevant amendments had been made in sub.s. (1)

In Cl. (c) word "deliberately" was deleted by the Finance Act 1964 with effect from 1st April, 1964.

Cl. (iii) provides for quantum of penalty that could be imposed in case of concealment, has also been amended from time to time, providing for different amount from time to time. Since we are not concerned with that aspect, the same are not relevant for the present purpose.

II. 1. The following Explanation was inserted by

the Finance Act 1964 with effect from 1st April 1964.

"Explanation:- Where the total income returned by any person is less than eighty per cent of the total income (hereinafter in this Explanation referred to as the correct income) as assessed under section 143 or section 144 or section 147 (reduced by the expenditure incurred bona fide by him for the purpose of making or earning any income included in the total income but which has been disallowed as a deduction), such person shall, unless he proves that the failure to return the correct income did not rise from any fraud or any gross or wilful neglect on his part, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income for the purpose of clause (c) of this sub-section."

10. With effect from 1-4-1968 different amount of calculating penalty in respect of concealment of particulars of income or furnishing inaccurate particulars was provided about which we are not presently concerned.

11. By the Finance Act, 1964, in Clause (c) above, the word "deliberately" was deleted before furnishing inaccurate particulars of such income and explanation was inserted with effect from 1-4-1964. In other words, with effect from 1-4-1964 penalty provisions regarding concealment of the income stood as under :-

"Cl.(iii) :-In the cases referred to in clause (c), in addition to any tax payable by him, a sum which shall not be less than twenty per cent but which shall not exceed one and a half times the amount of the tax, if any, which would have been avoided if the income as returned by such person had been accepted as the correct income."

Explanation:-

"Where the total income returned by any person is less than eighty percent of the total income (hereinafter in this Explanation referred to as the correct income) as assessed under Sec. 143 or Section 144 or Section 147 (reduced by the expenditure incurred bona fide by him for the purpose of making or earning any income included in the total income but which has been disallowed as a deduction), such person shall, unless he

proves that the failure to return the correct income did not arise from any fraud or any gross or wilful neglect on his part, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income for the purposes of clause (c) of this Sub-section."

12. The provisions regarding penalty for concealment as originally indicated in the Income Tax Act, 1961 were paramateria and identical with the provisions regarding penalty for concealment of income u/s 28 of the Income Tax Act 1922. In the aforesaid circumstances, contention of Mr. Shelat learned Counsel for the Revenue is right to the extent that though the principles enunciated by the Supreme Court in Anwar Ali's case (supra) in light of Section 22 of the Income Tax Act, 1922, may be applicable to the provisions of Section 271 (1) (c) as it stood prior to 1-4-1964 but after amendment in the Act of 1961 w.e.f. 1-1-1964 the principle cannot be applied de hors the statutory provisions.

13. It is to be noticed that element of conscious act on the part of the assessee is concerned, it is inherent in the expression of concealment. The penalty for furnishing inaccurate particulars of the income is subject to the precondition of existence of mensrea was attributed to the use of the word "deliberately" in the original provision. If the amendment has rested with omission of the word "deliberately", perhaps it would have been possible for one to contend that the findings having been reached about furnishing inaccurate particulars of the income by the assessee, the penalty would follow automatically. However, simultaneously with omission of the word "deliberately" from clause (c) of Section 271 (1) Explanation was inserted in the aforesaid form which makes existence of fraud or gross or wilful neglect on the part of the assessee in concealing the particulars of the income or in furnishing inaccurate particulars of such income is necessary requirement before penalty could be imposed by raising of presumption of concealment of income for furnishing inaccurate particulars. Only by satisfactory explaining his conduct which excludes fraud, or wilful and gross neglect on his part that assessee gets out of its operation. That is to say if the assessee is able to rebut the presumption with reference to his absence of mensrea, the position reverts back to as before. Mensrea thus still formed the part of entire amount with the difference that in case of availability of presumption burden of proving lack of it

is on the assessee. Reading of Explanation leaves no room of doubt that if the returned income of the assessee is less than 80% of the assessed income of the assessee, it will be deemed that the assessee has concealed the particulars of his income or furnished inaccurate particulars of such income for the purpose of levy of penalty under clause (c) unless it is proved that it was not result of any fraud or any gross or willful neglect on his part. This implies that the act of concealment or furnishing inaccurate particulars in respect of the income subject to penalty must be as a result of fraud or any gross or willful neglect on the part of the assessee. However, on whom that burden lies to prove existence of fraud or gross or willful neglect on the part of the assessee or absence of it, it depends upon the ratio of the assessed income and returned income. In other words, where return income is more than 80% of the assessed income the burden would be on the revenue to prove concealment of income or inaccurate particulars of the income which have been disclosed with the return as a result of fraud on the part of the assessee or as a result of any gross or willful neglect on the part of the assessee. In case, returned income is less than 80% of the assessed income burden would be on the assessee, to prove absence of any fraud or any gross or willful neglect on his part in concealing the particulars of income or furnishing inaccurate particulars of such income. In view of the aforesaid it can be said that two requirements before penalty can be justified which must coexist viz; (i) that the particulars of income which are held to be concealed or inaccurate must relate to assessee's income of the previous year relevant to the assessment year in question and (ii) circumstances must be shown that concealment of such income or furnishing of inaccurate particulars is result of any fraud or any gross or willful neglect on the part of the assessee. As noticed by reading Explanation, during continuance of the aforesaid Explanation burden to prove whether there exists any fraud or any gross or willful neglect on the part of the assessee would depend upon the ratio between assessed and returned income as per the assessment order. But the fact that burden of proof would depend upon ratio between assessed and return income does not detract from the fact in either case that penalty must be justified on existence of two facts.

14. Applying the aforesaid test if we examine the order of the Tribunal, so far as the fact about furnishing inaccurate particulars of income which forms the part of the return is concerned, the Tribunal has in unmistakable terms found against the assessee which the

assessee also does not dispute. The nature of interest included in the refund order is income is also not disputed and cannot be disputed. Therefore, so far as first part of the requirement of the proceedings for penalty is concerned, is satisfied. However, it is apparent that the Tribunal has justified penalty only on the ground that the assessee furnished inaccurate particulars of his income and the fact that it was due to oversight does not detract from the fact the assessee has furnished inaccurate particulars makes its abundantly clear that the Tribunal has not recorded finding about existence of absence of fraud or any gross or willful neglect to justify levy of penalty. The fact that the returned income of the assessee was more than 80% of the assessed income and the Explanation could not be invoked by the revenue would not detract from the legal position for establishing two requirements. Contention of learned advocate for the revenue that since returned income was more than 80% of assessed income cannot be of any avail as it should not be a reason for holding that in case quantum of concealment of income or inaccurate particulars have been furnished is less existence and absence of a willful or gross neglect would become irrelevant than when quantum of income concealed in respect of which inaccurate particulars have been furnished is more. It would result in anomalous situation where a person found defaulting more will be in beneficial position than a person with small irregularity with no intention. We do not find any reason to accept such interpretation as suggested by the learned Counsel for the revenue which leads to such anomalous position.

15. As a result of the aforesaid discussion, we answer to the aforesaid questions referred to us in negative i.e. in favour of the assessee and against the revenue. Reference stands accordingly disposed of, with no order as to costs.